

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

INDEX

Falls Church, Virginia 22041

File: A38 622 400 - Baltimore

Date: MAY 13 1999

In a re: RAGUBAR DAYAL DEONARAIN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Fabienne Chatain, Esquire
Elliot & Mayock
1629 K Street, N.W., Suite 1250
Washington, D.C. 20006

ON BEHALF OF SERVICE: Harriett J. Hickman
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Termination of proceedings

This case was last before us on October 20, 1998, when we remanded the record to the Immigration Judge for further proceedings. The respondent has now filed an appeal from an Immigration Judge's decision dated December 21, 1998, finding him deportable under section 241(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(A)(iii), as an alien convicted of an aggravated felony. The appeal will be sustained, and the proceedings terminated. The respondent's request for oral argument is denied.

The dispositive issue raised on appeal is whether a "record of conviction" relating to a conviction that has subsequently been vacated may be considered to determine whether an alien has been convicted of sexual abuse of a minor as defined in section 101(a)(43)(A) of the Act, and thus, is deportable under section 241(a)(2)(A)(iii) of the Act.

The record reveals that the respondent, a native and citizen of Guyana, was convicted on October 14, 1994, in the Circuit Court for Montgomery County, Maryland for the offense of second degree sexual offense. However, on June 11, 1998, the Circuit Court granted the respondent's motion for Post Conviction Relief pursuant to the Uniform Maryland Post Conviction Act, Article 27, Section 645. The State of Maryland subsequently elected not to prosecute the respondent, but instead filed new criminal charges. In this regard, the respondent was found guilty of third degree sexual offense. Section 464B of the Maryland Code provides in relevant part as follows:

§ 464B Third degree sexual offense

(a) Elements of offense. -- A person is guilty of a sexual offense in the third degree if the person engages in:

- (1) Sexual contact with another person against the will and without the consent of the other person, and:**
 - (i) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably concludes is a dangerous or deadly weapon; or**
 - (ii) Inflicts suffocation, strangulation, disfigurement or serious physical injury upon the other person or upon anyone else in the course of committing that offense; or**
 - (iii) Threatens or places the victim in fear that the victim or any person known to the victim will be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnaping; or**
 - (iv) Commits the offense aided and abetted by one or more other persons; or**
- (2) Sexual contact with another person who is mentally defective, mentally incapacitated, or physically helpless, and the person knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless; or**
- (3) Sexual contact with another person who is under 14 years of age and the person performing the sexual contact is four or more years older than the victim; or**
- (4) A sexual act with another person who is 14 or 15 years of age and the person performing the sexual act is at least 21 years of age; or**
- (5) Vaginal intercourse with another person who is 14 or 15 years of age and the person performing the act is at least 21 years of age.**

....

MD Code 1957, Art. 27, § 464B(a)(1)(iii) (1998).

The Immigration and Naturalization Service charged that the respondent is deportable as an alien convicted of an aggravated felony. Section 101(a)(43)(A) of the Act, as it relates to the respondent, defines an aggravated felony as sexual abuse of a minor. The respondent was convicted of violating section 464B(a)(1)(iii). Although section 464B(a)(1)(iii) of the Maryland Code is a sexual abuse offense, the age of the victim is not an essential element of the crime that

the respondent was convicted of. Thus, we turn to the record of conviction and to other documents admissible to determine whether the respondent's conviction constitutes sexual abuse of a minor within the meaning of section 101(a)(43)(A) of the Act. See Matter of Pichardo, Interim Decision 3275 (BIA 1996). However, the record of conviction relating to the respondent's conviction for third degree sexual offense, which includes the criminal court's docket information, general case information, commitment record, and information, does not refer to the age of the victim (Remand Exh. 2). Instead, the only documents that reveal the age of the victim, who was 16 years old at the time of underlying circumstances, are the record of the vacated conviction for second degree sexual offense (Remand Exh. 1).

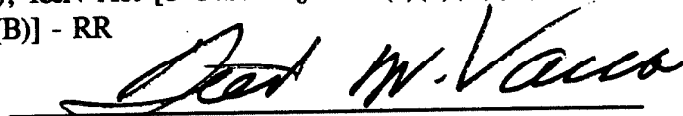
Since section 241(a)(2)(A)(iii) of the Act, like sections 241(a)(2)(A)(i) and (C) of the Act, which relate to convictions for crimes involving moral turpitude and firearms offenses, mandates a focus on the respondent's conviction and not the conduct, we find that the documents relating to the vacated conviction should not have been relied upon by the Immigration Judge in finding that the respondent had been convicted of a sexual abuse of a minor offense within the meaning of section 101(a)(43)(A) of the Act. See Matter of Prichardo, *supra*; Matter of Franklin, 20 I&N Dec. 867 (BIA), *aff'd*, 72 F.3d 571 (8th Cir. 1995); Matter of Serna, 20 I&N Dec. 579 (BIA 1992). Although these documents constitute part of a "record of conviction" as traditionally defined by the Board, they do not specifically relate to the conviction that is alleged to support the ground of deportability. Moreover, although the documents relating to the vacated conviction are material, we note that these documents are not admissible as evidence in proving a criminal conviction since the respondent was not convicted of second degree sexual offense. See Matter of Teixeira, Interim Decision 3273 (BIA 1996); see also 8 C.F.R. § 3.41 (1998).

Accordingly, since the record of conviction relating to the respondent's conviction for third degree sexual offense fails to establish that the victim was a minor, we find that the Service has failed to establish that the respondent has been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act, and thus, is not deportable under section 241(a)(2)(A)(iii) of the Act.

ORDER: The Immigration Judge's decision finding the respondent deportable pursuant to section 241(a)(2)(A)(iii) of the Immigration and Nationality Act is vacated.

FURTHER ORDER: The deportation proceedings against the respondent are terminated.

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - RR


FOR THE BOARD